

Federal Court



Cour fédérale

Date: 20190125

Docket: IMM-2510-18

Citation: 2019 FC 110

Québec, Québec, January 25, 2019

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

ELEMERNE BABOS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision rendered by a member of the Immigration and Refugee Board, Refugee Protection Division (RPD) rejecting a refugee claim under sections 96 and 97 of *IRPA*.

[2] For the reasons that follow, I have concluded that this application should be granted.

II. BACKGROUND

[3] The applicant, Elemerne Babos, is 71 years old and a citizen of Hungary. She alleges that she is of Roma ethnicity and would be persecuted if she were to return to Hungary.

[4] The applicant alleges multiple instances of persecution and mistreatment as a Roma person in Hungary. She first made a refugee claim with her daughter and her daughter's family. This claim was refused in 2013 by the RPD. The applicant sought judicial review of this decision which was granted in 2014. The current decision under review is the second determination of the applicant's refugee claim by the RPD.

III. DECISION UNDER REVIEW

[5] The determinative issue in the impugned decision was the applicant's identity as Roma.

[6] The RPD referred to section 106 of *IRPA* and Rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256, which provide as follows:

***Claimant Without
Identification***

Credibility

106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

Étrangers sans papier

Crédibilité

106 La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

***Documents Establishing
Identity and Other Elements
of the Claim***

Documents

11 The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.

***Document établissant
l'identité et autres éléments de
la demande***

Documents

11 Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

[7] The RPD found that the applicant did not prove her Roma ethnicity for the following reasons:

- A. There was insufficient credible evidence to establish her Roma ethnicity:
 - i. The applicant provided no more than vague answers and superficial observations regarding the traditions and customs in the Roma culture; and
 - ii. Though she lived in the building that housed the Roma Civil Rights Foundation for many years, there was no evidence that being Roma was a requirement for this arrangement;
- B. There was insufficient corroborating documentary evidence establishing her Roma ethnicity:
 - i. The applicant did not sufficiently show her relationship with Virginia Ivancsik and Robert Ivancsik, whom she claims are her family members and who were identified as Roma;

- ii. Though a notice of “Approval in Principle” for granting permanent residence to her daughter Maria Ivancsikne Babos and her family was produced, the reasons for that decision were not and therefore the decision had no probative value;
 - iii. A police complaint from her alleged cousin, Tibor Balog, had no probative value as it did not discuss the applicant’s ethnicity;
 - iv. The transcript from the previous RPD hearing in which the applicant’s daughter Beatta Babos described the applicant as a “gypsy” was given little weight as the previous hearing did not address the applicant’s claim;
 - v. The applicant’s passport was not determinative of her ethnicity as her place of birth is a city with both Roma and non-Roma people; and
 - vi. Alternatively, even if the alleged familial connections were all established and those family members are of Roma ethnicity, this evidence would be insufficient to establish the applicant’s ethnicity because families can be of mixed ethnicity;
- C. Though the applicant’s identity was not doubted at the previous RPD hearing, the current RPD panel did not have access to the previous decision, and furthermore that decision had been set aside on the basis that the RPD had failed to consider the applicant’s refugee claim; and
- D. The applicant was not able to provide a reasonable explanation for the lack of documents concerning her ethnicity.

[8] The RPD also found that the applicant did not establish that the poor medical assistance she would receive in Hungary was for any reason other than the government’s inability to provide adequate services for all of its citizens.

[9] The RPD concluded that the applicant “ha[d] not established that she is or would be perceived by authorities or others in Hungary as Roma.” The RPD further noted that the merits of the applicant’s claim did not have to be analyzed because her identity had not been established.

IV. ISSUES

[10] The applicant’s arguments fall within two categories:

- A. The RPD erred in concluding that the applicant did not establish her Roma ethnicity; and
- B. Regardless of the applicant’s ethnicity, the RPD erred in not assessing whether she is a person in need of protection under section 97 of *IRPA*.

V. STANDARD OF REVIEW

[11] The parties are agreed that the issues addressed in this decision are to be subject to review on a standard of reasonableness. As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47:

... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. ANALYSIS

[12] It is not necessary for me to address all of the errors argued by the applicant. It is sufficient in this case to address two.

[13] The first alleged error to be addressed concerns the applicant's answers to the RPD's questions concerning Roma traditions and customs. At paragraph 25 of its decision, the RPD stated as follows:

The panel finds that the claimant's testimony about her Roma identity was for the most part vague, and her answers to the panel's questions consisted primarily of superficial observations. For example, she repeated that "the traditions", "the music", "the dance", "the dress" are the basis of her Roma identity and the Roma identity generally. When the panel asked her to provide more detail about these things, she was unable to do so, beyond other superficial observations, referring, for example, to how Roma wear "long skirts" and are "poor".

[14] Having reviewed the transcript of the RPD hearing, I see no basis for the statement that the applicant was unable to provide adequate detail about the examples of Roma traditions and customs that she raised. Where the RPD asked whether the applicant could provide additional detail, she answered "yes" and provided further detail. The RPD gave no indication that the additional detail was insufficient, and there is no reason to believe that the applicant could not have provided yet further information if she had been asked to do so. In fact, she went on to describe in some detail some of the food that would be served traditionally at a Roma wedding, including stuffed cabbage, ham soup, and gypsy bread.

[15] Accordingly, I find the RPD's conclusion that the applicant was not able to provide adequate detail concerning Roma traditions and customs to be unreasonable. Moreover, based on my reading of the RPD's decision, I am satisfied that this erroneous conclusion was of sufficient importance that the RPD's decision might have been different if the error had not been made.

[16] The second alleged error to be addressed concerns the RPD's conclusion in paragraph 43 of its decision that the applicant had not established that she would be perceived by authorities in Hungary as Roma.

[17] While I acknowledge that it was reasonable for the RPD to be concerned about (i) the lack of documentary support for the applicant's claim of Roma ethnicity, and (ii) the failure of the applicant to provide any reasonable explanation for the absence of such documentary support, there is a distinction between being Roma and being perceived as Roma. The applicant provided testimony of many instances of persecution and mistreatment that she suffered as a Roma person in Hungary, and the RPD did not indicate any conclusion that such testimony lacked credibility. Rather, the RPD's main concern was with the lack of documentary support of the applicant's Roma ethnicity. But doubts about her actual ethnicity do not contradict her allegations as a person who is perceived to be Roma.

[18] In my view, the RPD's conclusion that the applicant would not be perceived by Hungarian authorities as Roma lacks justification, transparency, and intelligibility, and is therefore unreasonable.

[19] The distinction between being Roma and being perceived as Roma may seem fine, but it matters in this case because the RPD went on to conclude that, as a result, the merits of the applicant's claim did not have to be assessed. That conclusion would make sense only if the RPD had satisfied itself that the applicant would likely not be exposed to risks of the kind contemplated in section 97 of *IRPA*. I am not convinced that this issue has been properly assessed as regards the perception that the applicant is Roma.

[20] If the RPD had considered the merits of the applicant's claim, including the allegations of mistreatment in Hungary as a perceived Roma (which the RPD did not disbelieve), then it appears that the RPD's decision might have been different.

VII. CONCLUSION

[21] Accordingly, the present application for judicial review will be granted.

[22] The parties are agreed that there is no serious question of general importance to certify.

JUDGMENT in IMM-2510-18

THIS COURT’S JUDGMENT is that:

1. The present application is granted.
2. The impugned decision of the Refugee Protection Division is set aside, and the matter is remitted for redetermination by a different decision-maker.
3. There is no question of general importance to certify.

“George R. Locke”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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